LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 19 1970
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

——— Term, 1970

No. 1206

WILLIAM MINOR PATRUM, JR., - - Petitioner,

versus

CITY OF GREENSBURG, KENTUCKY, - Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

THEODORE WURMSER,
GARY L. GARDNER,
EUBANKS, GARDNER
& SCHAEFER,
999 Portland Federal Bldg.,
200 West Broadway,
Louisville, Kentucky 40202
Attorneys for Petitioner.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

INDEX.

PAGE

Opinions Below 2

Jurisdiction 2

Questions Presented for Review 2

Statement of the Case 2– 7

Point I—The factors considered by the Court below forming the basis for its decision are in derogation of the legislative intent and purpose of Section 1983, Title 42 U.S.C.A. This presents a substantial Federal question not heretofore before this Court for determination 3– 4

Point II—The conflicting opinions among the Federal circuits rendering interpretations of "pendent jurisdiction" not in accord with the applicable decisions of this Court requires review for clarification of a substantial Federal question not heretofore determined by this Court 5– 7

Conclusion 7

Appendix A—Opinion of United States Court of Appeals for the Sixth Circuit 9–12

Appendix B—Opinion of the United States District Court for the Western District of Kentucky 13–16

AUTHORITIES CITED.

Cases:

	PAGE
Basista v. *Weir*, 340 F. 2d 74 (CA 3, 1965)	7
Egan v. *City of Aurora*, 365 U. S. 514, 81 S. Ct. 684, 5 L. Ed. 2d 741	4
Fisher v. *New York*, 312 F. 2d 890 (CA 2, 1963)	4
Gibbs v. *United Mine Workers*, 343 F. 2d 609 (CA 6, 1965)	6
Haney v. *City of Lexington*, Ky., 386 S. W. 2d 738, 10 ALR 3d 1362 (1963)	3, 4
Kahn v. *Garanzini*, 411 F. 2d 210 (CA 6, 1969)	4
King v. *Smith*, 392 U. S. 309, 88 S. Ct. 2128, 20 L. Ed. 2d 1118	5
McArthur v. *Pennington*, 253 F. Supp. 420 (ED., Tenn.)	6
Monroe v. *Pape*, 365 U. S. 167, 81 S. Ct. 480, 5 L. Ed. 2d 492	3, 4
Puett v. *City of Detroit*, 323 F. 2d 591 (CA 6, 1963)	4
Ritchie v. *United Mine Workers*, 410 F. 2d 827 (CA 6, 1969)	6
Riverside Coal Co., Inc. v. *United Mine Workers*, 410 F. 2d 267 (CA 6, 1969)	6
Roberts v. *Williams*, 302 F. Supp. 972 (N. D. Miss.)	6
Sauls v. *Hutto*, 304 F. Supp. 124 (ED. La.)	6
United Mine Workers v. *Gibbs*, 383 U. S. 715, 86 S. Ct. 1130, 16 L. Ed. 2d 218	5, 6
Wojtas v. *City of Niles*, 334 F. 2d 797 (CA 7, 1964)	6
Yank v. *City of Lexington*, Ky., 431 S. W. 2d 892 (1968)	3, 4

Statute:

28 U.S.C. 1254(1)	2
42 U.S.C.A. 1983	2, 3, 4
28 U.S.C.A. 1343(3)	3
U. S. Constitution: Fourteenth Amendment	3

IN THE

SUPREME COURT OF THE UNITED STATES

_____ Term, 1970

No. _____

WILLIAM MINOR PATRUM, JR., - - *Petitioner,*

v.

CITY OF GREENSBURG, KENTUCKY, - *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, William Minor Patrum, Jr., hereby petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit, affirming the dismissal by the United States District Court for the Western District of Kentucky of that portion of petitioner's complaint for damages against the City of Greensburg, Kentucky, alleging violation of the common law of Kentucky, and invoking the "pendent jurisdiction" of the lower court.

OPINIONS BELOW.

The opinion below is reported at —— F. 2d ——. It is appended hereto as Appendix A. Appendix B consists of the opinion of the Federal District Court and is reported at 292 F. Supp. 370.

JURISDICTION.

The order sought to be reviewed was made and entered on December 10, 1969. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question is 28 U.S.C.A., Sec. 1254(1).

QUESTION PRESENTED FOR REVIEW.

Whether petitioner's complaint for damages which alleges that defendants, a police officer and his employer, City of Greensburg, Kentucky, jointly and severally, under color of state law, violated his rights secured by the Fourteenth Amendment, Title 42 U.S.C. Section 1983, and the common law of Kentucky, properly alleges federal "pendent jurisdiction", where the police officer's liability is based upon a federal claim, and that of the city upon the state common law doctrine of "respondeat superior."

STATEMENT OF THE CASE.

This action was filed by petitioner on September 18, 1968, in the United States District Court for the Western District of Kentucky. In petitioner's complaint, he alleged violation of rights secured by the

Fourteenth Amendment to the United States Constitution, 42 U.S.C.A., Section 1983, and by the Common law of Kentucky through *Yank* v. *City of Lexington,* 431 S. W. 2d 892 (1968); *Haney* v. *City of Lexington,* 386 S. W. 2d 738, 10 ALR 3d 1362.

In support of these allegations, petitioner contended that one William Martin, a police officer employed by the City of Greensburg, while on duty in that capacity, had administered an unprovoked beating to petitioner and thereafter illegally incarcerated him.

Pursuant thereto petitioner invoked the jurisdiction of the federal judiciary under Title 28 U.S.C.A., Section 1343(3) and sought to invoke the "pendent jurisdiction" of the federal court to also determine the state common law claim for damages.

The District Court dismissed the complaint against the City of Greensburg, refusing to hear the state claim. The Circuit Court of Appeals affirmed.

POINT I.

The Factors Considered by This Court Below Forming the Basis for its Decision are in Derogation of the Legislative Intent and Purpose of Title 42 U.S.C.A., Section 1983. This Presents a Substantial Federal Question Not Heretofore Determined by This Court.

Petitioner is not unmindful of the Court's holding in *Monroe* v. *Pape,* 365 U. S. 167, determining that a municipal corporation was not a "person" within the meaning of Title 42 U.S.C.A., Section 1983. How-

ever, Justice Douglas' opinion further determined that Congress in 1871, while debating the passage of the Civil Rights Act, had met with an insurmountable Constitutional barrier in attempting to impose municipal liability among the several states, and that question was not resolved by the Court, at pp. 506, 507. Since that decision the status of "Federal municipal liability" has remained unchanged and has not been considered by the Court, *Egan* v. *City of Aurora,* 365 U. S. 514, when joined with a state common law claim for damages, where municipal immunity for the acts of its police officers has been abolished. *Haney* v. *City of Lexington,* Ky., 386 S. W. 2d 738 (1963) and *Yank* v. *City of Lexington,* Ky., 431 S. W. 2d 892 (1968).

The cases among the Federal Circuits brought under Section 1983 are numerous, but the decisions purporting to deny municipal liability on the basis of the decisions in *Monroe* and *Egan* were decided on grounds separate and distinguishable from the case at bar and the state common law claim was not present nor was the full import of *Monroe* raised. *Kahn* v. *Garanzini,* 411 F. 2d 210 (CA 6, 1969); *Puett* v. *City of Detroit,* 323 F. 2d 591 (CA 6, 1963); *Fisher* v. *New York,* 312 F. 2d 890 (CA 2, 1963). We submit that the Congressional passage of Title 42 U.S.C.A., Section 1983, in 1871, and the intent expressed therein, coupled with the State law decisions fulfilling that intention presents a novel and substantial Federal question not heretofore before this court for determination.

POINT II.

The Conflicting Opinions Among the Federal Circuits Rendering Interpretations of "Pendent Jurisdiction" Not in Accord With the Applicable Decisions of This Court Requires Review for Clarification of a Substantial Federal Question Not Heretofore Determined by This Court.

This court's last full review of the doctrine of "pendent jurisdiction" was consummated with the guidelines set forth in *United Mine Workers* v. *Gibbs,* 383 U. S. 715 (1966), and again briefly considered in *King* v. *Smith,* 392 U. S. 309 (1968). In *Gibbs,* as in the case at bar, where a federal statute and a claim for damages under state law were pleaded, the Court concluded that irrespective of the number of grounds or parties comprising plaintiff's case, there arose only one actionable wrong-entitled to but one recovery, at p. 226. Further justification for the existence and exercise of "pendent jurisdiction" was that plaintiff try his whole case in one judicial proceeding, at p. 226, if his wrong complained of arose from a common nucleus of operative fact and the considerations of judicial economy, convenience and fairness to the litigants be fulfilled, at p. 228.

The exercise of "pendent jurisdiction" has been phrased in terms of judicial *power* and discretion not as a right of plaintiff, *Gibbs,* at p. 228, however, an examination of the considerations of this problem among the federal circuits reveals diametrically opposing

opinions of the lower courts and the court below, some of which are in direct conflict with this Court's holding in *Gibbs*.

With similar facts before it, the Court below affirmed exercise of this discretionary function in *Ritchie* v. *United Mine Workers,* 401 F. 2d 827 (CA 6, 1969) and *Riverside Coal Co., Inc.,* 401 F. 2d 267 (CA 6, 1969); *Gibbs* v. *United Mine Workers,* 343 F. 2d 609 (CA 6, 1965). Again, in *McArthur* v. *Pennington,* 253 F. Supp. 420 (ED. Tenn.), the Federal Court with identical facts, as are herein pleaded, exercised its jurisdiction to adjudicate the common law claim against a municipal corporation of Tennessee. Jurisdiction was likewise exercised in *Sauls* v. *Hutto,* 304 F. Supp. 124 (ED. La.) decided July 23, 1969 and *Roberts* v. *Williams,* 302 F. Supp. 972 (N. D. Miss.) decided July 30, 1969. Discretionary jurisdiction was denied, however, in *Wojtas* v. *Village of Niles,* 334 F. 2d 797 (CA 7, 1964).

We submit, that should the lower courts and the court below be allowed to continue exercising a discretionary function in the manner as in the case at bar, the end result will allow petitioner a double recovery for his injuries arising from one tort, as the doctrine of *res judicata* will not be applicable in any subsequent state suit, *Gibbs* at p. 227.

The lack of clarification of the points set forth herein and the exercise of a discretionary function by some federal courts and the denial by others is in derogation of the equal protection sought to be afforded by

the Civil Rights Act. *Basista* v. *Weir,* 340 F. 2d 74 (CA 3, 1965), at p. 86. This, we submit, presents a substantial federal question not heretofore determined by this Court.

CONCLUSION.

This Court should grant certiorari, and the judgment below should be reversed.

Respectfully submitted,

THEODORE WURMSER,
GARY L. GARDNER,
EUBANKS, GARDNER & SCHAEFER,
999 Portland Federal Building,
200 West Broadway,
Louisville, Kentucky 40202
Attorneys for Petitioner.

APPENDIX A.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 19287

WILLIAM MINOR PATRUM, JR., *Appellant*,
v.
CITY OF GREENSBURG, KENTUCKY, *Appellee*.

APPEAL from U.S. District Court for the Western District of Kentucky.

Decided December 10, 1969.

Before WEICK, Chief Judge, O'SULLIVAN and PHILLIPS, Circuit Judge.

O'SULLIVAN, Circuit Judge. Appellant Patrum, Jr., claims that he was arrested and beaten by William Martin, a policeman of the City of Greensburg, Kentucky, in violation of Patrum's civil rights secured to him by the First and Fourteenth Amendments to the Constitution of the United States, and by 42 U.S.C.A. § 1983. He filed a complaint in the United States District Court for the Western District of Kentucky seeking damages from the policeman, William Martin, the Mayor of the City of Greensburg, and the City of Greensburg, Kentucky. The Mayor and the City of Greensburg were joined in the complaint under the theory of *respondeat superior*. Upon motion by the defendants, the Mayor and the City of Greensburg were dismissed from suit. This is an appeal from that portion of

the order of the District Court dismissing the City of Greensburg.

Appellant argues that the District Court had "pendent jurisdiction" over the cause of action against the city by reason of 28 U.S.C.A. § 1343, which expressly grants jurisdiction to the District Courts in civil actions for violations of civil rights, and because under Kentucky law a city may be made liable for the tort of one of its policemen. The District Court, feeling that there was no justification for the exercise of "pendent jurisdiction," dismissed the claim against the city.

We affirm.

In *United Mine Workers* v. *Gibbs,* 383 U.S. 715 (1966), a labor case in which the plaintiff was seeking to recover damages from the U.M.W. under § 303 of the Labor Management Relations Act and the common law of Tennessee for an alleged unlawful conspiracy and boycott which interfered with his trucking contract with a coal operator, the Court held that a District Court did properly exercise "pendent jurisdiction" when "the federal and state claims arose from the same nucleus of operative fact and reflected alternative remedies" against the defendant. In discussing "pendent jurisdiction" the Court indicated:

> "Pendent jurisdiction in the sense of judicial *power,* exists whenever there is a claim 'arising under (the) Constitution, the Laws of the United States, and Treaties made, or which shall be made under their Authority—' U.S. Const. Art. III, Sec. 2, *and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case'. The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. Levering & Garrigues* v. *Marrin,* 289 U.S. 103. (Emphasis supplied) 383 U.S. at 725.

and continued at page 726:

> "That power need not be exercised in every case in which it is found to exist. *It has consistenly been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants;* if these are not present, a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them, *Erie R. Co.* v. *Tompkins,* 304 U.S. 64." (Emphasis supplied.)

We read the decision of the Supreme Court in *Gibbs* as indicating: (1) The decision to exercise the power of the doctrine of "pendent jurisdiction" lies within the discretion of the trial court; (2) in determining whether to invoke the doctrine of pendent jurisdiction, the trial court should look to the relationship between the federal and state claims against the defendant, here the City of Greensburg, to determine of one constitutional case exists; and (3) the federal claim must have sufficient substance to confer subject matter jurisdiction on the court.

The Supreme Court of the United States has held that a municipality is not a person within the meaning of 42 U.S.C.A. § 1983,[1] and that federal jurisdiction of a municipality is not obtained thereunder or under 28 U.S.C.A. § 1343. *Monroe* v. *Pape,* 365 U.S. 167 (1961); *Egan* v. *City of Aurora,* 365 U.S. 514 (1961), and see our decisions in *Puett* v. *City of Detroit,* 323 F(2) 591, 593 (6th Cir. 1963) and *Kahn* v. *Garanzini,* 411 F(2) 210 (6th Cir. 1969). Under Kentucky law, however, a city may be held liable for

---

[1]Section 1983 reads:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

the damage caused to an individual by a police officer. *City of Lexington* v. *Yank,* 431 S.W. (2) 892 (1968). Consequently, the cause of action against the separate defendant, City of Greensburg, is wholly within the law of the State of Kentucky.[2] Appellant argues that a municipal corporation—here the City of Greensburg—acts only through its agents and servants and that, therefore, the act of its police officer is, in fact, its own act. We are not persuaded that the city becomes a "person" within the meaning of 28 U.S.C. § 1983 and can thus be held an offender under the Civil Rights Act.

We hold, also, that the resolution of whether to retain the City of Greensburg in this litigation was a matter within the discretion of the District Court, and that the District Court properly exercised its discretion in refusing to invoke the doctrine of pendent jurisdiction. *Wojtas* v. *Village of Niles,* 334 F(2) 797 (7th Cir. 1964), *cert. denied,* 379 U.S. 964 (1965); *Rosenthal & Rosenthal, Inc.* v. *Aetna Casualty & Surety Co.,* 259 F. Supp. 624, 630 (S.D. N.Y. 1966); *Gautreau* v. *Central Gulf S.S. Corp.,* 255 F. Supp. 615 (E.D. La., 1966) and *Hall* v. *Pacific Maritime Association,* 281 F. Supp. 54, 61 (N.D. Calif., 1968).

The judgment of the District Court is affirmed.

---

[2]Appellant urges that he does not have a complete remedy in the state courts because trial would not be held in a neutral forum—he would be forced to bring suit in Greensburg against the city and its police officer. We consider, however, that appellant may properly seek a remedy for this problem by petitioning for a change of venue on the basis of KRS § 452.010(2) as follows:

> "A party to any civil action triable by a jury in a circuit court may have a change of venue when it appears that, because of the undue influence of his adversary or the odium that attends the party applying or his cause of action or defense, he cannot have a fair trial in the county."

APPENDIX B.

WEST KEY NUMBER SYSTEM.

William Minor Patrum, Jr., - - - - - Plaintiff,

v.

William Martin, George Huddleston and City of Greensburg, Kentucky, - - - Defendants.

No. 1309.

UNITED STATES DISTRICT COURT

W. D. Kentucky,

Bowling Green Division.

Nov. 8, 1968.

Action under Civil Rights Act. The defendants moved to dismiss. The District Court, Mac Swinford, J., held that allegations that defendant police officer was acting pursuant to orders and directions from defendant city and defendant mayor, that mayor knew of police officer's dangerous propensities but did not attempt to halt his course of conduct, and that wrongful acts were committed with knowledge and consent of city and mayor and were thereafter approved by city and mayor contained no definite assertion of mayor's personal participation in wrongful acts and were not sufficient to render him liable under Civil Rights Act.

Motion sustained in part and overruled in part.

1. Civil Rights (key) **13.**

A municipal corporation is immune from liability under the Civil Rights Act. 28 U.S.C.A. § 1343(3); 42 U.S.C.A. §§ 1983, 1985.

2. Civil Rights (key) **13.**

The mayor, or any official who has general supervision over police officer who committed allegedly wrongful acts,

is not responsible under Civil Rights Act unless he was present or personally directed such acts or cooperated in them. 28 U.S.C.A. § 1343(3); 42 U.S.C.A. §§ 1983, 1985.

3. Civil Rights (key) **13.**

Allegations that defendant police officer was acting pursuant to orders and directions from defendant city and defendant mayor, that mayor knew of police officer's dangerous propensities but did not attempt to halt his course of conduct, and that wrongful acts were committed with knowledge and consent of city and mayor and were thereafter approved by city and mayor contained no definite assertion of mayor's personal participation in wrongful acts and were not sufficient to render him liable under Civil Rights Act. 28 U.S.C.A. § 1343(3); 42 U.S.C.A. §§ 1983, 1985.

4. Courts (key) **263.**

It is within discretion of court whether to hear claims invoking pendent jurisdiction.

5. Courts (key) **263.**

Pendent jurisdiction was not exercised where federal interest in case could be substantially effectuated by providing forum for federal claim without state claim, which was particularly local in character.

Eubanks & Gardner, by Gary L. Gardner, Louisville, Ky., for plaintiff.

Bell, Orr & Reynolds, by Reginald L. Ayers, Bowling Green, Ky., for defendants.

MEMORANDUM AND ORDER.

SWINFORD, District Judge.

This action is brought invoking the court's jurisdiction under Section 1343(3) of Title 28, United States Code, and invoking the "pendent jurisdiction" of this court. Named as defendants are a police officer, the mayor, and the City

of Greensburg. The defendants have moved to dismiss for lack of jurisdiction and for failure to state a claim upon which relief can be granted.

[1] Defendants' first contention is that an action does not lie under 28 U.S.C.A. § 1343(3) or 42 U.S.C. §§ 1983 and 1985 against a municipality or a mayor thereof. A municipal corporation is immune from liability under the Civil Rights Act. Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492; Egan v. City of Aurora, 365 U.S. 514, 81 S.Ct. 684, 5 L.Ed.2d 741.

[2, 3] The mayor, or any official who has general supervision over the police officer who committed the allegedly wrongful acts, is not responsible under the Civil Rights Act unless he was present or personally directed such acts or cooperated in them. Jordan v. Kelly, W.D.Mo., 223 F.Supp. 731; Runnels v. Parker, C.D.Cal., 263 F.Supp. 271. The Complaint herein alleges in paragraph 7 that the defendant police officer "was acting pursuant to orders and directions from Defendant, City of Greensburg, by and through its mayor and highest executive officer, Defendant, George Huddleston", in paragraph 10 that the mayor knew of the police officer's dangerous propensities but did not attempt to halt his course of conduct, and in paragraph 11 that the wrongful acts were committed "with the knowledge and consent of Defendants, City of Greensburg, and George Huddleston, Mayor, or were thereafter approved by said Defendants". These allegations, containing no definite assertion of the mayor's personal participation in the wrongful acts, are not sufficient to render him liable under the Civil Rights Act.

[4, 5] Plaintiff has alleged claims against the mayor and the city based on state law and attempts to invoke this court's pendent jurisdiction. I need not decide whether this court has the power, under the doctrine of pendent jurisdiction, to hear plaintiff's claims under state law, because the

application of the doctrine would not be justified under the circumstances of this case. It is within the discretion of the court whether to hear claims invoking pendent jurisdiction. In United Mine Workers of America v. Gibbs, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218, the Supreme Court said:

> "That power need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them, Erie R. Co. v. Tompkins, 304 U. S. 64, 58 S.Ct. 817, 82 L.Ed. 1188. Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law."

The Supreme Court in *Gibbs* pointed out that the state claim prosecuted under the court's pendent jurisdiction, implicated the federal doctrine of pre-emption, and thus the state claim was closely tied to questions of federal policy. But in the instant case, there is no such justification for the exercise of pendent jurisdiction. The federal interest in this case can be substantially effectuated by providing a forum for the federal claim without the state claim, which is particularly local in character.

The motion to dismiss is sustained as to the defendants, George Huddleston and the City of Greensburg.

The motion to dismiss is overruled as to the defendant, William Martin.